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Protection of human rights and fundamental freedoms while countering terrorism

Study of the United Nations High Commissioner for Human Rights*

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* This report was delayed in submission due to additional research and consultations.

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I. Introduction

1. In its resolution 58/187, the General Assembly requested the High Commissioner for Human Rights, "taking into account the views of States, to submit a study on the extent to which the human rights special procedures and treaty monitoring bodies are able, within their existing mandates, to address the compatibility of national counter-terrorism measures with international human rights obligations in their work, for consideration by States in strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism, with regard to the international human rights institutional mechanisms". The resolution requested that the study be submitted to the General Assembly at its fifty-ninth session, with an interim report to the Commission on Human Rights at its sixtieth session. The interim report is contained in the report of the Secretary-General to the Commission on Human Rights (E/CN.4/2004/91).

2. In its resolution 2004/87, the Commission on Human Rights requested the High Commissioner to complete the study requested in resolution 58/187. It also decided to designate, for a period of one year, an independent expert to assist the High Commissioner in the fulfilment of the resolution's mandate on the protection of human rights and fundamental freedoms while countering terrorism, including completion of the study. The independent expert was further requested, "taking fully into account the study requested in General Assembly resolution 58/187, as well as the discussions in the Assembly and the views of States thereon, to submit a report, through the High Commissioner, to the Commission at its sixty-first session on ways and means of strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism". On 9 July 2004, the Chairman of the Commission on Human Rights appointed Professor Robert Goldman (United States of America) as the independent expert pursuant to resolution 2004/87.

3. The present document contains the study requested by the General Assembly. It has been prepared by the Office of the High Commissioner for Human Rights (OHCHR). It was submitted to the independent expert for his comments, which have been taken into account.

II. Interim report

4. In the interim report, it was noted that, cumulatively, the seven United Nations human rights treaty bodies examine over 100 reports per year, and the relevant special procedures consider up to some 60 country situations per year. "In both instances, the attention of the treaty bodies and the special procedures ranges over a number of issues, leaving only partial space for an in-depth examination of the compatibility of national counter-terrorism measures with international human rights obligations" (E/CN.4/2004/91, para. 25).

III. Views of States

5. OHCHR sent a note verbale to Member States on 2 June 2004, seeking additional views on the protection of human rights and fundamental freedoms while countering terrorism and, in particular, on the extent to which the human rights special procedures and treaty bodies are able, within their mandates, to address the

compatibility of national counter-terrorism measures with international human rights obligations. As of 27 August 2004, 13 replies had been received which are summarized below. Responses of States to an earlier note verbale, including six responses that specifically addressed the treatment of national counter-terrorism measures by the special procedures and treaty bodies, were included in the interim report on the study to the sixtieth session of the Commission on Human Rights (E/CN.4/2004/91). The full texts of all replies are available at OHCHR.

6. The Government of **Argentina** stated there is a delicate balance between the protection the State must provide against the threat of terrorism and respecting and guaranteeing human rights. The balance does not permit indiscriminate restrictions on human rights, but rather stipulates that only those limitations that are unavoidable and legitimate under international law, especially international human rights law, are permissible. The Government underscored that -- despite the unusual conditions under which the struggle against terrorism is taking place -- an essential point is that State action against terrorism is not a responsibility that is antithetical to the protection of human rights and democracy. Not being limited to emergency situations, the defence of the State against terrorism must take place in conformity with international and national law with respect to human rights, respecting such rights as the rights to equality, due process and privacy, among others. Even when the State decrees exceptional measures suspending certain guarantees, there are rights that may not be suspended under the pretext of counter-terrorism. The Government stated that it values the efforts of the Commission on Human Rights and the General Assembly in addressing a theme of such importance to the international community. It referred to its concern over the situation of persons in the territories of States of which they are not citizens, including migrant workers, refugees and persons seeking asylum from persecution, who are particularly vulnerable to human rights violations in the context of counter-terrorism measures. It concluded by saying that it would be useful to find opportunities for dialogue and reflection to raise international awareness on the necessity of ensuring that security measures conform with international human rights and humanitarian law, and to exchange examples of best practices.

7. The Government of **Azerbaijan** stated that it was among the first States to join the emerging coalition against terrorism following the 11 September 2001 attacks on the United States of America. It has acceded to 12 international and 9 European conventions on the fight against terrorism and described a series of national measures it has instituted. The Government said that Azerbaijan has suffered 373 terror attacks originating from the Republic of Armenia and the separatist regime in Nagorny-Karabakh. It believes international cooperation against terrorism should be based on strict observance of the basic norms and principles of international law, and more active employment and improvement of international mechanisms for cooperation. Basic principles should include rejection of any attempt to give the fight against terrorism a religious or ethnic character, abandonment of double standards, and adoption of coordinated sanctions against States that in one way or another support terrorist, extremist and separatist activities.

8. The Government of **Chile** said that terrorism is a menace that attacks the foundations of human society and must be confronted decisively by the international community. It referred to its chairmanship of the Security Council's "1267 Committee" dealing with sanctions against those suspected of links to Al-Qaida and the Taliban, and to its ratification of the 12 international conventions against

terrorism. In this new situation of uncertainty and violence, a safer world requires a new consensus and formulas that acknowledge the multidimensional character of the threat and that place individuals at the centre of concern. It is from this perspective that the concept of human security has emerged that inspired Chile's participation in the Human Security Network. Chile's actions in confronting terrorism are oriented, on one hand, towards active participation in international forums and, on the other, towards national activities based mainly on human security. Resolution 58/187 is fully consistent with Chile's approach, since it reaffirms that States must ensure that their actions comply with international law, in particular human rights law, refugee law and international humanitarian law. The Government said that its national legal order is consistent with resolution 58/187, as all counter-terrorism action takes place with full respect for the constitutional and legal obligations of public authorities, in a framework of equality and human dignity. Regarding the compatibility of national counter-terrorism measures with international human rights obligations that could be the focus of the special procedures and treaty bodies, by constitutional mandate the State recognizes that human rights are a limit on the exercise of sovereignty. The Constitution establishes the duty of State organs to respect and promote the rights contained therein, as well as those provided for by Chile's international obligations. This guarantees the legal framework for complying with resolution 58/187.

9. The Government of **Colombia** provided a copy of a recent counter-terrorism statute implementing provisions of the Legislative Act of 2003 intended to prevent the commission of terrorist acts. The legislation envisions actions to prevent the commission of terrorist acts, such as the formation of special units of military judicial police and the provision of information on residence. While the law establishes limitations on the rights to personal liberty as well as to the inviolability of residences without prior court order, it is limited to cases of terrorism, and is subject to immediate administrative control, subsequent judicial control, twice-yearly political review and individual accountability.

10. The Government of **Costa Rica** reiterated its vehement condemnation of terrorism and said it has been active in the ongoing efforts of the international community to combat it. Nonetheless, it is vitally important that the fight against terrorism always take place in strict conformity with international law, and particularly with human rights, as the two are not mutually exclusive. Costa Rica has firmly supported the need for joint action and coordination among States, while recognizing that each State bears an important responsibility with respect to its own inhabitants. The integration of these approaches serves to strengthen the vision of democracy and social justice to which all States Members of the United Nations aspire, and permits international security to be seen as a concept in which social and economic stability plays a major role. The Government has urged strong action, with strict respect for human rights, at numerous international and regional meetings, has ratified a number of relevant international instruments, and has taken specific counter-terrorism action at the national level. It referred in particular to the question of freezing of assets, stating that in Costa Rica such action requires a court order.

11. The Government of **Cuba** stated that the terrorist attacks of 11 September 2001 in New York, which Cuba strongly condemned, could have served as a catalyst for genuine international cooperation in the struggle against terrorism. However, ultrareactionary, militarist and fascist circles working with the Government of the United States have manipulated the expression of international solidarity with the people of the United States to try to impose a hegemonic dictatorship of global

reach. The Government said that as part of the so-called counter-terrorism struggle, more than 600 detainees, supposedly linked to the Al-Qaida terrorist network or the Taliban of Afghanistan, of 42 nationalities, remain imprisoned in the United States naval base on illegally occupied Cuban territory at Guantánamo, without charge, nor access to counsel, nor trial, in veritable cages, in conditions of isolation and chained at all times, in the worst style of the Middle Ages. All that happens in this veritable concentration camp, as corroborated by some of the few detainees who have been freed, violates the most basic principles of the Geneva Conventions, as well as the Universal Declaration of Human Rights and other international instruments. Counter-terrorist measures must be consistent with States' legal obligations under international law, which clarify, first, that all human beings are subject to the protection of international law, and second, that there is no excuse whatever that justifies or condones any of the practices and laws being applied, in particular by the United States Government, on the pretext of the struggle against terrorism. The international community and the United Nations human rights organs must reject impunity for the grave, flagrant and systematic human rights violations being committed by the United States, in complicity with its closest allies, in the name of counter-terrorism, in particular in Iraq and Guantánamo.

12. The Government of **Kuwait** stated that it has made every effort to protect human rights and prevent any act, including acts of terrorism, that may threaten or impair human rights. Terrorism poses a fundamental threat to human rights, particularly the right to life and the right to live in security and peace. Moreover, since acts of terrorism are by their very nature random, their victims are usually children and women. The Government has called for the highest possible level of international cooperation in order to eliminate terrorism and protect the right of human beings to the full enjoyment of their rights and freedoms, particularly the rights to life, freedom and security. It said it has taken steps to adopt legal and practical measures to prevent terrorist acts, for example by acceding to relevant international and regional conventions and adopting a number of domestic legal measures. The Government provided a list of counter-terrorism measures it has undertaken. It has also acceded to international instruments, notably the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, and the Convention on the Prevention and Punishment of the Crime of Genocide.

13. The Government of **Mexico** said that States are under an obligation to fight against terrorism in conformity with the international treaties to which they are party, resolutions of the Security Council and other applicable norms of international law. At the same time, they have a duty to respect the rights and freedoms of individuals under international law. The two obligations are not exclusive but are, rather, complementary, since it is only in a system in which the rule of law is promoted and the human rights of all are protected that an effective struggle against terrorism may be assured. The Government said that the recommendations of the High Commissioner for Human Rights should serve as a guide on how States can and must combine the obligation to safeguard the security of their populations with the duty to respect the human rights of all. The fight against terrorism is multidimensional and ranges from prevention to pursuit and prosecution and in this sense, affects diverse human rights. Both the special procedures and the treaty bodies have mandates limited to certain types of violations. Yet the Universal Declaration of Human Rights recognizes many rights,

some of which do not have monitoring or supervisory mechanisms. In recent years some mechanisms have expressed concern over the apparent contradiction between some counter-terrorism methods and the full enjoyment of human rights. Mechanisms responsible for security generally propose security-based approaches, placing human rights at a lower level. Although the international human rights organs have noted that certain human rights have come under particular pressure in the struggle against terrorism, the responses by States so far have been limited. It is thus necessary to seek to address the issue in an integrated way, permitting respect for human rights as rights that are universal, indivisible and interdependent and thereby strengthening the struggle against terrorism. It is also essential to strengthen the links between the organs responsible for security and counter-terrorism (such as the Counter-Terrorism Committee) and the human rights mechanisms.

14. The Government of **Morocco** said that after the country's accession to the Arab Convention for the Suppression of Terrorism and international counter-terrorism conventions consistent with Security Council resolutions and recommendations, it implemented a special counter-terrorism law in May 2003 which defines terrorism and is part of the Penal Code. Under this law, Morocco is able to deal with terrorism by using legal mechanisms that guarantee fundamental rights, in which the prosecutor plays an important role. The guarantees include the right of suspected persons to have access to counsel from the beginning of proceedings through the appeals stage. In this regard, the Government is taking human rights principles seriously through the implementation of legal instruments to counter terrorism.

15. The Government of the **Russian Federation** reiterated its consistent position that all counter-terrorism measures undertaken on its territory should be implemented in strict accordance with the principle of the rule of law, including compliance with international human rights standards. It said that in accordance with the Constitution, the recognized principles and rules of international law and international treaties of the Russian Federation are a component part of the country's legal system. The Government said it continues to seek the development of a comprehensive strategy to address new threats and challenges on the solid foundation of international law. It noted that, at the fifty-seventh session of the General Assembly, it had made a proposal for drafting, under United Nations auspices, a code for the protection of human rights against terrorism whose elements were included in Assembly resolution 58/174 on human rights and terrorism, which it had co-sponsored. The Government referred to laws and international agreements it has implemented, dealing with a range of issues including joint counter-terrorism operations with neighbouring States, prevention of human trafficking, and penalties for the incitement of ethnic, racial or religious hatred and other forms of extremism. It also referred to changes made in the Criminal and Criminal Procedure Codes to deal with terrorism, which underwent expert analysis by the Council of Europe and revealed no substantial shortcomings requiring immediate correction. It referred to draft legislation which, inter alia, would ban dissemination through the mass media of any information that may hinder the conduct of a counter-terrorist operation. Other draft legislation includes a measure addressing negotiations for the release of hostages, which would prohibit providing money or other assets as ransom to terrorists, and would establish that terrorists' release of hostages or voluntary surrender could not serve as a basis for exoneration from criminal responsibility.

16. The Government of **Spain** stated that the struggle against terrorism has been and remains a concern and a priority for the people of Spain as well as its Government. In this respect, Spain has developed a series of counter-terrorism measures marked by scrupulous respect for Spain's constitutional framework, in which respect for the fundamental rights and freedoms of the individual are the supreme value and limit all governmental action. The Government said that despite the terrorist scourge from which Spain has suffered for decades, there does not exist a specific body of law for the struggle against terrorism. However, this does not exclude the possibility that this exceptional crime would receive special treatment not associated with laws generally applicable to the investigation of other crimes. This approach is foreseen in constitutional provisions on the possibility of suspending certain rights, and extends to regulation of the exceptional incommunicado regime. Concerning the international framework, the principles of legality and international legitimacy, supported by a large consensus among the international community, must be the pillars on which international efforts are based. The Government has shown full cooperation and transparency toward both United Nations and regional human rights mechanisms. It provided an overview of relevant national provisions relating to the definition and prosecution of acts of terrorism, including the exceptional regime of incommunicado detention, available only in respect of the offences of terrorism and organized crime, which includes constitutional guarantees. It also described action taken on behalf of victims of terrorism, who are among the main concerns of counter-terrorism measures since it is they who suffer most directly the consequences of terrorist violence.

17. The Government of **Switzerland**, referring to examples of new counter-terrorism legislation, cited a federal law which came into force in October 2003 on surveillance of correspondence which criminalizes the financing of terrorism. It noted that the law excludes from its coverage certain activities related to free expression and lawful activity. The Government fully supports the provision of resolution 58/187 calling on the special procedures and treaty bodies to examine the protection of human rights in counter-terrorism measures and to coordinate their efforts in this respect. It said that respect for all human rights and the rule of law is essential to prevent and eradicate terrorism at the national and international levels. In addition to supporting the existing mechanisms, the Government is inclined to give favourable consideration to the creation of a new mechanism to monitor the compatibility of counter-terrorism measures with international human rights. This new special procedure could, for example, be responsible for: studying the compatibility of national laws, and their application, with relevant human rights obligations; verifying that States do not use the pretext of counter-terrorism to infringe on human rights, for example by violating the rights of persons who have peacefully used their right to free expression, including prisoners of conscience; establishing guidelines on respecting human rights in the international struggle against terrorism; gathering relevant and credible information and responding to urgent appeals; advising the High Commissioner on ways to integrate a human rights approach in technical assistance programmes; submitting amicus curiae briefs to courts; and reporting to the Commission on Human Rights and the General Assembly.

18. The Government of the **Syrian Arab Republic** said that the aim of counter-terrorism is in fact to protect human rights while confronting the terrorist attacks committed by individuals or groups that terrorize the population and contribute to

general insecurity. Its security forces, in cooperation with the population, are dealing with acts of terrorism using legal measures to eliminate terrorism and bringing suspected terrorists before the law based on the Constitution and domestic law, including the right of suspects to legal defence. Its position is based on the balance that must be found between human rights, personal liberties, and the special measures related to international counter-terrorism conventions.

19. In sum, the views received from States, including those contained in the interim report on the study to the sixtieth session of the Commission on Human Rights (E/CN.4/2004/91), express strong condemnation of acts of terrorism. They also indicate that counter-terrorism measures should respect human rights and fundamental freedoms. In several instances, States emphasized that national legislation must be in conformity with international human rights standards. Several States underlined that it is also essential to take steps for the human rights of victims of terrorism. Some new proposals were put forward, including the idea of a code for the protection of human rights against terrorism. Different views were given on the question of the extent to which the special procedures and treaty monitoring bodies are able, within their existing mandates, to address the compatibility of national counter-terrorism measures with international human rights obligations in their work. While some States were open to considering new ways to address the issue, others considered that the existing mechanisms are adequate to the task and suggested that the creation of a new mechanism could lead to duplication.

IV. National counter-terrorism measures and the special procedures and treaty monitoring bodies

A. Special procedures of the Commission on Human Rights

20. In his last report (A/58/266), the Secretary-General showed that the United Nations human rights mechanisms, including the special procedures, had identified a range of rights that have come under pressure as a result of counter-terrorism measures. These include the rights to life and to freedom from torture and cruel, inhuman or degrading treatment or punishment; respect for the principle of legality; the right to freedom from arbitrary detention; elements of the right to fair trial, including the right to counsel; freedom of thought, conscience and religion; freedom of expression and assembly; freedom from discrimination; the right to seek and to enjoy asylum from persecution; and respect for human rights provisions applicable to emergency situations. The current report of the Secretary-General (A/59/__) indicates that aspects of national counter-terrorism measures continue to be addressed by the human rights special procedures.

21. Over the past three years, several of the special procedures have referred to aspects of the issue of protecting human rights while countering terrorism in their reports to the General Assembly and the Commission on Human Rights. For example, in their main reports to the sixtieth session of the Commission in 2004, 13 special procedures referred to the issue, while the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance also submitted a special report.[1] The 13 procedures were the Special Rapporteur on the question of torture,[2] the Special Rapporteur on extrajudicial, summary or arbitrary executions,[3] the Special Rapporteur on the independence of

judges and lawyers,[4] the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,[5] the Special Rapporteur on the right to freedom of opinion and expression,[6] the Special Rapporteur on freedom of religion or belief,[7] the Special Rapporteur on violence against women,[8] the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,[9] the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living,[10] the Special Rapporteur on mercenaries,[11] the Special Representative of the Secretary-General on the situation of human rights defenders,[12] the Working Group on Arbitrary Detention (an entire section),[13] and the Working Group on Enforced or Involuntary Disappearances.[14]

22. Also over the past three years, several special procedures devoted entire or nearly entire reports to the issue of protecting human rights while countering terrorism, each within its mandate. These have included, as mentioned above, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,[15] as well as the Special Rapporteur on the question of torture[16] and the Special Representative of the Secretary-General on the situation of human rights defenders.[17]

23. Issues addressed by the special procedures have included, for example, the question of detention and the related issue of torture and ill-treatment. Both the Special Rapporteur on the question of torture and the Working Group on Arbitrary Detention have expressed concern over the practice in some States of holding terrorism suspects in incommunicado detention, prohibiting contacts with family members, counsel and other outside assistance for certain periods of time. The Special Rapporteur on the question of torture has stated that incommunicado detention may facilitate torture and could in itself amount to a form of cruel, inhuman or degrading treatment.[18] The Working Group on Arbitrary Detention, in opinions on communications relating to persons accused of links to terrorism who had been held incommunicado for extended periods, without knowledge of charges against them and without access to counsel or other outside assistance, found such violations serious enough to qualify the deprivations of liberty arbitrary.[19] The Working Group on Arbitrary Detention has also expressed concern over indefinite detention without trial of persons suspected of terrorism.[20] In its latest report to the Commission, the Working Group devoted a four-page section to the protection of human rights in the fight against terrorism, expressing concern over "the arbitrary character of detention in several countries where inquiries into terrorist acts are being conducted."[21] The issue of detention has also been raised by the Special Rapporteur on the human rights of migrants, who highlighted the increased use of detention of non-citizens as a consequence of the heightened international security climate.[22]

24. Another concern addressed by the special procedures is the use of military and other special courts to try terrorism-related offences. The practice has been criticized by the Special Rapporteur on the independence of judges and lawyers[23] and the Working Group on Arbitrary Detention.[24]

25. Violations of the right to life in the context of counter-terrorism measures have recently been addressed by the Special Rapporteur on extrajudicial, summary or arbitrary executions[25] and, in the case of country-based special procedures, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967.[26]

26. Counter-terrorism measures frequently raise concerns over possible discrimination. This issue was addressed in two special reports submitted by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the situation of Muslim and Arab peoples in various parts of the world in the aftermath of the events of 11 September 2001.[27] In addition, discrimination has been addressed in reports of the Special Rapporteur on freedom of religion or belief (risk that counter-terrorism impacts freedom of religion and could have negative effects on entire religious communities),[28] the Special Rapporteur on the human rights of migrants (failure of counter-terrorism measures to respect Governments' human rights obligations vis-à-vis migrants),[29] and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (use of counter-terrorism laws against indigenous organizations and their supporters to penalize protest activities and legitimate demands).[30] Meanwhile, restrictions on freedom of expression and association as well as the right to personal security were the subjects of an entire report of the Special Representative of the Secretary-General on the situation of human rights defenders (use of security legislation, including counter-terrorism measures, to hinder the work of human rights defenders and sometimes to target them directly)[31] and have also been addressed by the Special Rapporteur on the right to freedom of opinion and expression.[32]

27. The special procedures have issued joint public statements on the issue of counter-terrorism measures in the context of their annual meetings in 2003 and 2004. In the statement of 27 June 2003, endorsed by 20 of the special procedures, while acknowledging the need to counter terrorism, they also expressed "profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which negatively affect the enjoyment of virtually all human rights — civil, cultural, economic, political and social."[33] In their joint statement of 25 June 2004, 18 special procedures expressed the wish that four of them (the Special Rapporteurs on the independence of judges and lawyers, on the question of torture, and on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as well as the Chairperson of the Working Group on Arbitrary Detention) conduct joint missions to Iraq, Afghanistan, the Guantánamo Bay military base and elsewhere, in order to ascertain, each within his or her mandate, that international human rights standards are properly upheld with regard to persons arrested, detained or tried on grounds of alleged terrorism or other violations.[34]

28. The main factor limiting full consideration of national counter-terrorism measures by the special procedures, as noted in the interim report to the Commission on Human Rights, is that each mandate-holder must address a range of concerns -- in addition to counter-terrorism — within the scope of his or her mandate. The reports of the special procedures are, moreover, subject to significant length restrictions. Thus, while many have alluded to relevant concerns, they have only infrequently treated them in depth. As noted earlier, some special procedure mandates have devoted substantial portions of some reports, and even entire reports, to the impact of counter-terrorism on certain rights or groups. These contributions, important as they are, cannot however be considered comprehensive treatments of the impact of national counter-terrorism measures on human rights and fundamental freedoms.

29. In addition to their main reports, thematic special procedure mandate-holders submit reports on country missions they have undertaken during the year, usually numbering two or three per mandate. Two of these country reports submitted to the sixtieth session of the Commission on Human Rights considered aspects of counter-terrorism measures.[35] The Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 also addressed a wide range of counter-terrorism measures in his report to the Commission.[36] However, counter-terrorism measures were not the only subject of concern in these reports.

30. Special procedures also receive individual complaints and respond by sending letters and urgent appeals to Governments in cases which appear to show serious human rights violations. Some of these complaints have related to counter-terrorism action by Governments.

31. The General Assembly in resolution 58/187 requested the special procedures to coordinate their efforts in the area of counter-terrorism. This has proved difficult to achieve in practice, with the exception of the joint statements mentioned above, owing to the range of issues involved. However, as of 27 August 2004, the special procedures had sent eight joint urgent appeals and allegation letters related to counter-terrorism since the beginning of the year.

32. The fact that aspects of national counter-terrorism measures have been considered by several of the special procedures shows, first, that such measures fall at least partly within the mandates of these procedures. Second, it shows that counter-terrorism measures have an impact on a wide range of rights and rights holders. The special procedures, however, are able only to address national counter-terrorism measures within their respective mandates, each of which is normally focused on a specific set of rights or rights holders, or a specific country.

B. Sub-Commission on the Promotion and Protection of Humaa Rights

33. The Sub-Commission on the Promotion and Protection of Human Rights, at its forty-eighth session in 1996, requested Kalliopi Koufa (Greece) to prepare a working paper on the question of terrorism and human rights, and the following year it appointed her to serve as Special Rapporteur to conduct a comprehensive study on the issue. Prof. Koufa has submitted six papers plus annexes, addressing many issues related to terrorism and human rights such as the legal definition of terrorism, application of the term to acts committed in conflict and the overlap of international human rights and humanitarian law, typologies of terrorism (whether committed by States or non-State actors), and actions of international and regional bodies. The reports do not, however, address counter-terrorism in depth and do not consider specific national counter-terrorism measures. Prof. Koufa submitted her final report under the mandate to the fifty-sixth session of the Sub-Commission in August 2004.[37]

34. At its fifty-sixth session, the Sub-Commission, in decision 2004/103, decided to establish a sessional working group at its fifty-seventh session in 2005, with a mandate "to elaborate detailed principles and guidelines with a relevant commentary concerning the promotion and protection of human rights when combating terrorism."

35. As reiterated by the Commission on Human Rights in its resolution 2001/60, in fact, the Sub-Commission does not at present have a mandate to address country situations in its resolutions and, in negotiating and adopting thematic resolutions, it is obliged to refrain from referring to specific countries. It is authorized by the Commission on Human Rights only to debate country situations not being dealt with in the Commission, as well as urgent matters involving serious violations of human rights in any country, with its discussions reflected in the summary records. As a result, the Sub-Commission is not in a position to address the compatibility of national counter-terrorism measures with international human rights obligations.

C. Treaty monitoring bodies

36. The human rights treaty monitoring bodies have played a vital role in analysing national counter-terrorism measures in their review of State party reports. The Human Rights Committee has been the most active, commenting on counter-terrorism measures in concluding observations for 18 countries of a total of 45 considered since the latter part of 2001.[38] The Committee now routinely considers the compatibility of counter-terrorism measures with States parties' obligations under the International Covenant on Civil and Political Rights (ICCPR) when reviewing their reports.

37. Issues addressed by the Human Rights Committee have touched on many rights contained in the Covenant. It has, for example, drawn attention on several occasions to vague or overbroad definitions of terrorism and related offences in national legislation, which may violate the non-derogable principle of legality (ICCPR, art. 15).[39] The Committee has also expressed concern over counter-terrorism measures that may infringe on the right to life, including in the context of armed conflict and in application of the death penalty;[40] the right to freedom from torture and other forms of ill-treatment;[41] freedom from arbitrary detention and respect for fair-trial principles, including access to counsel;[42] the right to freedom of expression;[43] the right to freedom from discrimination;[44] respect for non-refoulement;[45] action against impunity for violations committed in counter-terrorism operations;[46] and respect for human rights provisions applicable to emergency situations.[47]

38. The Committee against Torture (CAT) and the Committee on the Elimination of Racial Discrimination (CERD) have also commented on counter-terrorism measures, although less frequently. CAT routinely asks States parties for information on counter-terrorism legislation adopted pursuant to Security Council resolutions. It has recently expressed concern with respect to counter-terrorism practices that may increase the likelihood of torture, including incommunicado detention;[48] limits on independent judicial supervision of arrest and detention and increased risk of torture;[49] and disregard for the principle of non-refoulement.[50] CERD has drawn attention to detention regimes that may discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin;[51] reported cases of Islamophobia following the attacks on the United States of America of 11 September 2001;[52] and exceptional measures applied against non-citizens that may increase the likelihood of refoulement.[53] Both committees have also issued general statements on issues raised by counter-terrorism measures.[54] The Committee on the Rights of the Child has occasionally addressed national counter-terrorism measures,

for example, recently expressing concern over measures allowing for the prosecution of children by special courts.[55]

39. There are several limitations on the treaty bodies' ability to address national counter-terrorism measures comprehensively. First, they can only address the practices of States that have ratified the respective treaties. Since a substantial number of States have not ratified the main treaties containing rights most affected by counter-terrorism measures,[56] there is a significant gap in the coverage of the treaty bodies.

40. The treaty bodies are also limited because their work calendars provide for only a limited number of reports to be considered annually. For the Human Rights Committee, only 15 State reports are normally considered annually; for CERD, 22; and for CAT, 12. In addition, many States are long overdue in submitting their reports, in some cases for periods of 10 years or more. As of 27 August 2004, 93 reports were overdue to the Human Rights Committee (55 by at least five years, 23 by 10 years or more), 49 reports were overdue to CERD, and more than 100 to CAT.

41. The Human Rights Committee has an exceptional procedure whereby it can consider, in private session, a State party's implementation of the rights recognized in Covenant, even absent a report, but it has only been used four times since 2002. The Committee may also request special submissions from States parties in cases of compelling human rights concern, but this procedure, likewise, has rarely been used.

42. Some of the treaty bodies consider individual petitions, if the State concerned has acceded to the relevant procedure. Considerably fewer States have acceded to the complaint procedures than to the treaties themselves.[57] In any case, only a few of the petitions received have concerned counter-terrorism measures.

D. Issues not fully addressed by the special procedures and treaty monitoring bodies

43. Several issues widely considered to be relevant with respect to national counter-terrorism measures have not been addressed in depth under the existing mandates.[58] This is so with respect to the special procedures, either because the issues do not fall within the mandates or they present unusual complexities making them less amenable to comprehensive consideration. While some of the issues have been taken up occasionally by the treaty bodies, this has only been in the context of examining a single State's report. The issues include, for example:

- **Principle of legality *(nullum crimen, nulla poena sine lege)*.** The Human Rights Committee has on several occasions expressed concern over definitions of terrorism or terrorism-related offences in national legislation that appear to be vague or overbroad, raising the possibility that the law could be misused to suppress lawful activity. While the issue of the legal definition of terrorism has been addressed by the Human Rights Committee and mentioned by other mechanisms, it is not currently addressed systematically with respect to national counter-terrorism measures.
- **Extraterritorial and "secret" detention.** Some States are reported to hold persons in connection with counter-terrorism operations at undisclosed locations both on their own territories and at foreign locations over which they exercise some form of control. The lack of information concerning detainees'

whereabouts raises several concerns, including access to family members, counsel and the courts. The fact that some detentions may occur in the context of armed conflict raises questions of the applicability of international humanitarian law. The Human Rights Committee, in its recent general comment No. 31 (2004), affirmed the human rights obligation of States parties to the Covenant to adhere to the treaty with respect to "anyone within the power or effective control of that State party, even if not situated within the territory of the State party." This issue was mentioned also in the last report of the Working Group on Arbitrary Detention.[59] However, the international scope of the phenomenon, the complex issues presented, and difficulties in verifying the facts suggest that it cannot be readily addressed through the existing special procedure mandates.

- **Fair-trial rights.** Counter-terrorism measures have included the introduction of new procedures for use in the detention of suspected terrorists and the prosecution of terrorism-related cases. Some measures, such as the expanded use of military tribunals, have been addressed by special procedures including the Special Rapporteur on the independence of judges and lawyers and the Working Group on Arbitrary Detention (see para. 24 above). However, other measures have not yet been treated in depth by the special procedures. These include, for example, measures permitting detention to be based on information, including non-evidentiary information, withheld from the accused (so-called "secret evidence"). Another example is judicial or quasi-judicial investigative procedures that may affect the right not to be compelled to testify against oneself. A number of detention regimes allow limits on habeas corpus and similar remedies, limits on access to counsel, and indefinite detention without trial. The presumption of innocence sometimes appears to be disregarded. Some of these procedures have been criticized by some of the special procedures, notably the Working Group on Arbitrary Detention. However, the question of the compatibility of many of these procedures with international human rights obligations has not yet been fully addressed by the special procedures and treaty monitoring bodies.

- **Inter-State transfer of persons suspected of terrorism, including extradition and "rendition".** Security Council resolution 1373 (2001) requires that States "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations...." United Nations treaties on terrorism emphasize the importance of international cooperation in bringing perpetrators of acts of terrorism to justice, often invoking the principle *aut dedere aut judicare* (duty to extradite or prosecute).[60] The Security Council Counter-Terrorism Committee has paid particular attention to the question of extradition. Concern has been expressed, however, that extradition and so-called "rendition" of terrorism suspects sometimes occurs without regard to human rights, including the right to due process and the prohibition against refoulement.[61] While some special procedures have noted this issue,[62] none has provided in-depth analysis of the human rights dimensions of different forms of inter-State transfer of terrorism suspects.

- **Freedoms of association and assembly.** It has been observed that modern terrorism has evolved increasingly through the activities of national and international groups and associations of individuals. Counter-terrorism measures often involve enforcement action against such groups.[63] These measures can place pressure on respect for the principle of individual criminal responsibility and the rights to freedom of association and assembly.[64] Some counter-terrorism measures are reportedly broad enough to affect activities such as the rights of workers to organize and to strike. Articles 21 and 22 of ICCPR and other international and regional human rights provisions limit restrictions that may be applied to the rights to freedom of association and assembly in situations of exception. This area is not directly addressed by the existing special procedures, although it has sometimes been considered by the treaty bodies.

- **Right to privacy.** Security Council resolution 1373 (2001) requires States to improve cooperation, inter alia in the area of information sharing. Bilateral and multilateral agreements between law enforcement agencies of different States permit the sharing of personal data which it is believed may be relevant to preventing and prosecuting acts of terrorism. Concerns have been expressed that such measures may infringe on the right to privacy (ICCPR, art. 17).[65] None of the existing special procedures has a mandate to address this concern.

- **Right to property.** Security Council resolution 1373 (2001) also calls for better cooperation in identifying assets that can be used to facilitate the commission of acts of terrorism. Counter-terrorism measures have included the maintenance of lists by the United Nations as well as regional organizations and States intended to identify individuals or groups with suspected links to terrorism. States must freeze the assets of these persons or groups. Often no established remedy is available to those believing themselves to be wrongly included on such lists, resulting in possible arbitrary deprivation of property.[66] This area is not within any of the existing special procedure mandates.

- **Human rights provisions in emergency situations.** In its general comment No. 29 (2001), the Human Rights Committee clarified many aspects of Covenant article 4 on states of emergency, including the scope of non-derogable rights. Faced with the threat of terrorism, some States argue that they are obliged to resort to emergency measures. This area of the law is subject to strict conditions and procedures. The Human Rights Committee has infrequently addressed human rights in emergency situations with respect to some States, owing to factors detailed elsewhere in this study. None of the special procedures has a mandate to consider this issue in depth with respect to specific States.

- **Issues in the context of armed conflict.** Counter-terrorism measures frequently implicate both human rights and humanitarian law, to the extent they are implemented in recognized situations of armed conflict. Some of the special procedures have, for example, expressed concern with respect to alleged extrajudicial executions related to counter-terrorism committed in the course of armed conflict, and to alleged arbitrary detention.[67] The Working Group on Arbitrary Detention has noted, however, that "its competence to judge the lawfulness of the detention of suspected terrorists is challenged on the pretext that the Group's mandate does not cover situations of armed

conflict".[68] None of the existing special procedures has studied in depth the human rights dimensions of specific counter-terrorism measures taken in situations of armed conflict, nor has any fully analysed the interrelationship between international human rights and humanitarian law with respect to national counter-terrorism measures.[69]

V. Counter-Terrorism Committee

44. It is relevant to note in this study the work of the Counter-Terrorism Committee (CTC) established by Security Council resolution 1373 (2001). CTC receives reports from States on measures taken in implementation of resolution 1373 (2001), which obliges States to take additional steps to prevent and suppress the financing and preparation of acts of terrorism. CTC experts review State reports on counter-terrorism measures from multiple perspectives, including legislative drafting, financial law, immigration law, extradition law, police and law enforcement measures, and illegal arms trafficking.[70] OHCHR, some States (including at the Security Council), the vice-chair of the Human Rights Committee, and NGOs have urged the CTC also to consider the human rights dimension of counter-terrorism measures. OHCHR submitted notes to the CTC providing guidance for assessing the compliance of counter-terrorism measures with international human rights obligations.[71] Successive CTC chairs as well as the new head of the Counter-Terrorism Committee Executive Directorate (CTED) have welcomed dialogue with OHCHR on protecting human rights while countering terrorism. Information received from CTED in September 2004 indicated that it is the Executive Director's intention to include among his staff an expert on human rights, humanitarian law and refugee law.

VI. Conclusions

45. **Many of the special procedures of the Commission on Human Rights have considered human rights aspects of counter-terrorism measures, within their existing mandates, in their reports and statements. However, owing to the wide range of rights coming under pressure from counter-terrorism measures, analysis by the special procedures has evolved in a dispersed and fragmented way. Yet counter-terrorism measures are often implemented as a legal package, implicating a wide range of rights. The existing special procedures have thus been unable to provide a coherent and integrated analysis of the compatibility of national counter-terrorism measures with international human rights obligations.**

46. **With respect to the treaty monitoring bodies, several (mainly the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture) have provided vital analyses of the human rights aspects of national counter-terrorism measures. However, their capacity to address such measures is limited by several factors. Many States have not ratified the treaties most directly relevant to counter-terrorism. In addition, the treaty bodies consider only a few State party reports per year, and consideration of many States is further delayed because their reports are**

overdue. The treaty bodies are thus able, in the course of a year, to address only a fraction of national counter-terrorism measures taken worldwide.

47. **Overall, there are significant gaps in the consideration of national counter-terrorism measures by the United Nations human rights system. For all the reasons mentioned above, including limits in mandates and working methods, the United Nations has been unable to address the compatibility of national counter-terrorism measures with international human rights obligations in a comprehensive and integrated way. To do so effectively, it may be necessary to consider taking steps that may affect mandates, processes and resources.**

Notes

[1] Situation of Muslim and Arab peoples in various parts of the world (E/CN.4/2004/19).

[2] See E/CN.4/2004/56, para. 28.

[3] SeeE/CN.4/2004/7, para. 29.

[4] See E/CN.4/2004/60, paras. 58-60 and 73.

[5] See E/CN.4/2004/18, paras. 6 and 9.

[6] See E/CN.4/2004/62, paras. 49-50, 69-78, 80 and 84.

[7] See E/CN.4/2004/63, paras. 62, 78 and 153.

[8] See E/CN.4/2004/66, paras. 47, 63, 71 and 72.

[9] See E/CN.4/2004/80, paras. 44, 45, 47, 50 and 53.

[10] See E/CN.4/2004/48, para. 37.

[11] See E/CN.4/2004/15, paras. 35-36.

[12] See E/CN.4/2004/94, paras. 31, 52, 66 and 72.

[13] See E/CN.4/2004/3, paras. 50-71.

[14] See E/CN.4/2004/58, paras. 35, 36, 138, 140, 209, 256, 271 and 314.

[15] See E/CN.4/2004/19 and E/CN.4/2003/23.

[16] See A/57/173.

[17] See A/58/380.

[18] See, for example, A/57/173, para. 16.

[19] Opinions No. 5/2003 and No. 10/2003 adopted by the Working Group on Arbitrary Detention (E/CN.4/2004/3/Add.1). See also E/CN.4/2003/8, paras. 61-64.

[20] Opinion No. 4/1997 (E/CN.4/1998/44/Add.1).

[21] E/CN.4/2004/3, para. 53.

[22] E/CN.4/2003/85, paras. 25-38; A/58/275, para. 6.

[23] See, for example, E/CN.4/2004/60, para. 60, and E/CN.4/2003/65, para. 37.

[24] E/CN.4/2004/3, para. 67.

[25] E/CN.4/2004/7, para. 29.

[26] E/CN.4/2004/6, paras. 5 and 22-28.

[27] E/CN.4/2004/19 and E/CN.4/2003/23.

[28] E/CN.4/2004/63, para. 153.

[29] A/58/275.

[30] E/CN.4/2004/80 (paras. 44, 45, 47, 50 and 53) and Add.3.

[31] A/58/380.

[32] See E/CN.4/2004/62, paras. 49-50, 69-78, 80 and 84.

[33] E/CN.4/2004/4, annex I.

[34] E/CN.4/2005/5, annex I.

[35] See the report of the Special Rapporteur on Torture on his mission to Spain (E/CN.4/2004/56/Add.2), and the report of the Special Rapporteur on the situation of human rights of indigenous people on his mission to Chile (E/CN.4/2004/80/Add.3).

[36] E/CN.4/2004/6.

[37] E/CN.4/Sub.2/2004/40.

[38] See the concluding observations of the Committee on the reports of Belgium (CCPR/CO/81/BEL); Colombia (CCPR/CO/80/COL); Germany (CCPR/CO/80/DEU); Lithuania (CCPR/CO/80/LTU); Uganda (CCPR/CO/80/UGA); Sri Lanka (CCPR/CO/79/LKA); Philippines (CCPR/CO/79/PHL); the Russian Federation (CCPR/CO/79/RUS); Israel (CCPR/CO/78/ISR); Portugal (CCPR/CO/78/PRT); Estonia (CCPR/CO/77/EST); Egypt (CCPR/CO/76/EGY); the Republic of Moldova (CCPR/CO/75/MDA); New Zealand (CCPR/CO/75/NZL); Yemen (CCPR/CO/75/YEM); Hungary (CCPR/CO/74/HUN); Sweden (CCPR/CO/74/SWE); and the United Kingdom of Great Britain and Northern Ireland and the Overseas Territories (CCPR/CO/73/UK and CCPR/CO/73/UKOT).

[39] See the concluding observations of the Committee on the reports of Belgium (CCPR/CO/81/BEL); the Philippines (CCPR/CO/79/PHL); Israel (CCPR/CO/78/ISR); Estonia (CCPR/CO/77/EST); and Egypt (CCPR/CO/76/EGY).

[40] Concluding observations on the reports of Israel (CCPR/CO/78/ISR) and Uganda (CCPR/CO/80/UGA).

[41] Concluding observations on the reports of Israel (CCPR/CO/78/ISR) and Egypt (CCPR/CO/76/EGY).

[42] Concluding observations on the reports of Colombia (CCPR/CO/80/COL); Sri Lanka (CCPR/CO/79/LKA); Yemen (CCPR/CO/75/YEM); and the United Kingdom and the Overseas Territories (CCPR/CO/73/UK and CCPR/CO/73/UKOT).

[43] Concluding observations on the report of the Russian Federation (CCPR/CO/79/RUS).

[44] Concluding observations on the reports of Germany (CCPR/CO/80/DEU); Sweden (CCPR/CO/74/SWE); and the United Kingdom and the Overseas Territories (CCPR/CO/73/UK andCCPR/CO/73/UKOT).

[45] Concluding observations on the reports of Lithuania (CCPR/CO/80/LTU); New Zealand (CCPR/CO/75/NZL); Yemen (CCPR/CO/75/YEM); and Sweden (CCPR/CO/74/SWE).

[46] Concluding observations on the report of the Russian Federation (CCPR/CO/79/RUS).

[47] Concluding observations on the reports of Israel (CCPR/CO/78/ISR) and Egypt (CCPR/CO/76/EGY).

[48] Concluding observations on the report of Morocco (CAT/C/CR/31/2).

[49] Concluding observations on the report of Colombia (CAT/C/CR/31/1).

[50] Concluding observations on the report of Yemen (CAT/C/CR/31/4).

[51] Concluding observations on the reports of Sweden (CERD/C/64/CO/8) and the United Kingdom (CERD/C/63/CO/11).

[52] Concluding observations on the report of the United Kingdom (CERD/C/63/CO/11).

[53] Concluding observations on the report of Sweden (CERD/C/64/CO/8).

[54] CAT/C/XXVII/Misc.7 (2001) and CERD/C/60/Misc.22/Rev.6 (2002).

[55] Concluding observations on the report of India (CRC/C/15/Add.228). The Committee on Economic, Social and Cultural Rights and the Committee on Elimination of Discrimination against Women have generally not addressed counter-terrorism measures. The seventh human rights treaty body – the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families - has only just been established.

[56] As of 27 August 2004, 39 States had not yet ratified the International Covenant on Civil and Political Rights, 23 had not ratified the International Convention on the Elimination of All Forms of Racial Discrimination; 56 had not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and 42 had not ratified the International Covenant on Economic, Social and Cultural Rights.

[57] As of 27 August 2004, 104 States had ratified the Optional Protocol to ICCPR; 45 had made the relevant declaration under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination; and 56 had made the relevant declaration under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[58] For comprehensive analyses of this issue, see, for example, *International Terrorism: Legal Challenges and Responses*, report by the International Bar Association Task Force on International Terrorism, 2003; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (OEA/Ser.L/V/II.116, Doc. 5, rev.1 corr., 22 October 2002); Amnesty International, *Annual Report 2004*; Human Rights Watch, *World Report 2004*; International Federation for Human Rights, *Human Rights Defenders in a Security First Environment* ; Advisory Council of Jurists to the Asia Pacific Forum of National Human Rights Institutions, *Reference on the Rule of Law in Combating Terrorism*, May 2004; *Anti-Terrorism Measures, Security and Human Rights*, report by the International Helsinki Federation for Human Rights, 2003.

[59] E/CN.4/2004/3, para. 53.

[60] See, for example, articles 4, 8, 10 and 11 of the International Convention Against the Taking of Hostages (1979); articles 8, 9 and 10 of the International Convention for the Suppression of Terrorist Bombings (1997); arts. 10, 11 of the International Convention for the Suppression of the Financing of Terrorism (1999), as well as regional conventions on counter-terrorism.

[61] See, for example, *International Terrorism: Legal Challenges and Responses* (note 58 above), pp. 129-140.

[62] Report of the Working Group on Arbitrary Detention, (E/CN.4/2004/3); and the joint urgent appeal concerning the alleged transfer of five non-Malawi nationals from Malawi to the custody of the United States authorities in June 2003 (E/CN.4/2004/56 Add.1, para. 1823).

[63] See, for example, Inter-American Commission on Human Rights, op. cit. (note 58 above), paras. 358-364.

[64] Ibid.

[65] See *International Terrorism: Legal Challenges and Responses* (see note 58 above), pp. 61-63.

[66] Article 17, paragraph 2, of the Universal Declaration of Human Rights states: "No one shall be arbitrarily deprived of his property."

[67] See E/CN.4/2004/7 andE/CN.4/2004/3.

[68] E/CN.4/2004/3, para. 57.

[69] The complementarity between international human rights and humanitarian law was noted by the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, by the Inter-American Commission on Human Rights in its request for precautionary measures with respect to detainees in Guantanamo Bay of 13 March 2002, and by the Human Rights Committee in its general comment No. 29 (2001), paras. 9 and 11.

[70] http://www.un.org/Docs/sc/committees/1373/work.html.

[71] http://www.un.org/Docs/sc/committees/1373/ohchr2.htm.